

A Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)

HIGH COURT (PENANG) — ORIGINATING PETITION NO 26-4-91
SELVENTHIRANATHAN JC
29 OCTOBER 1993

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Companies and Corporations — Members' rights — Oppression — Petition for relief from oppression — Locus standi — Companies Act 1965 s 181

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The petitioner, a director and minority shareholder of the respondent company ('the respondent'), alleged that certain resolutions proposed by the board of directors of the respondent were aimed at stripping the respondent of its assets by disposing of its valuable assets at nominal values and to forestall the petitioner from taking legitimate action against the respondent. The petitioner applied for: (a) an order declaring that the proposed resolutions were not made bona fide in the interests of the respondent and were therefore bad in law and invalid; (b) an order prohibiting the respondent from passing or otherwise giving effect to the resolution to declare a dividend by distributing its entire shareholding of 408,000 in Trio Paper Mills Sdn Bhd; (c) appropriate remedies under s 181 of the Companies Act 1965 ('the Act'); and (d) the appointment of a receiver and manager. The respondent has applied to strike out the petition on the ground, inter alia, that it disclosed no reasonable cause of action and for the orders that: (a) the injunction earlier obtained by the petitioner be dissolved; (b) an inquiry as to damages be ordered in the event that the injunction was dissolved; and (c) costs of the application be paid by the petitioner to the respondent.

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Held, striking out the petition:

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- (1) For a petition to be filed under s 181 of the Act, it is incumbent upon the petitioner to show: (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures, including himself. Therefore, before any petitioner can seek the relief specified under s 181(2) of the Act, he has to first bring himself within one of the two limbs of s 181(1) so as to be able to complain of oppression, or unfair discrimination or being otherwise prejudiced.
- (2) There was nothing in the petition which showed that the petitioner was affected apart from and over and above the other shareholders

of the respondent so as to enable him to seek any relief under s 181(2)(a) of the Act. The acts complained of did not affect the petitioner alone in his capacity as a member of the respondent. The proposed resolutions would not affect the petitioner in particular but would affect all the shareholders collectively without the petitioner being singled out for oppression, or unfair discrimination or other prejudicial treatment so as to trigger off the protection mechanism in s 181(1) of the Act. The pleadings did not show what the petitioner was seeking to do or how exactly the proposed resolutions fell within the ambit of s 181 of the Act. Therefore, as the petition disclosed no reasonable cause of action against the respondent, it was struck out and it followed that the earlier injunction was also dissolved.

Per curiam:

- (1) It was not the duty of the court in these circumstances to police the affairs of the respondent. The proposed resolutions involved the interests of the respondent and its shareholders as a whole and it was for the shareholders to decide whether the distribution of the dividend should be approved or not. Where the interests of a company are involved as a whole, it is the company itself which should be concerned. That concern is expressed through the will of the shareholders at the general meeting and the will of the majority would have to prevail. Should the shareholders determine that the directors are in fact acting against the interests of the company, then it is for them to remove the directors.
- (2) The court took judicial notice of the fact that even public listed companies resort to dividend distribution by way of shares to reward their shareholders instead of distributing dividends in cash.

[Bahasa Malaysia summary]

Pempetisyen, seorang pengarah dan pemegang saham minoriti dalam syarikat responden ('responden'), mengatakan bahawa beberapa resolusi yang dicadangkan oleh lembaga pengarah responden bertujuan untuk melucutkan aset responden dengan melupuskan asetnya yang bernilai tinggi pada nilai nominal dan untuk menghalang pempetisyen daripada mengambil tindakan yang sah terhadap responden. Pempetisyen telah memohon untuk: (a) suatu perintah yang menegaskan bahawa resolusi yang dicadangkan itu tidak dibuat secara bona fide demi kepentingan responden dan dengan demikian adalah tidak sah di sisi undang-undang; (b) suatu perintah yang menghalang responden daripada meluluskan atau memberi kesan kepada resolusi untuk mengisytiharkan suatu dividen melalui pembahagian kesemua pegangan sahamnya yang berjumlah 408,000 saham dalam Trio Paper Mills Sdn Bhd; (c) remedi yang berpatutan di bawah s 181 Akta Syarikat 1965 ('Akta itu'); dan (d) perlantikan seorang penerima dan pengurus. Responden telah memohon untuk membatalkan petisyen

A itu atas alasan bahawa, antara lain, ia tidak mendedahkan sebarang kausa tindakan yang munasabah dan untuk perintah bahawa: (a) injunksi yang didapati terlebih dahulu itu dibubarkan; (b) suatu siasatan mengenai ganti rugi diperintahkan jika injunksi itu dibubarkan; and (c) kos permohonan ini dibayar oleh pempetisyen kepada responden.

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Diputuskan, membatalkan petisyen itu:

- (1) Supaya suatu petisyen dapat difailkan di bawah s 181 Akta itu, adalah wajib untuk pempetisyen menunjukkan: (a) bahawa urusan syarikat itu dijalankan atau kuasa pengarah digunakan dalam cara yang menindas terhadap satu atau lebih ahli atau pemegang debentur termasuk dirinya sendiri atau dengan tanpa mengendahkan kepentingannya atau mereka sebagai ahli, pemegang saham atau debentur syarikat itu; atau (b) bahawa suatu tindakan syarikat itu telah dilakukan atau akan dilakukan atau suatu resolusi ahli, pemegang debentur atau sebarang kelas ahli telah diluluskan atau dicadangkan yang mendiskriminasi secara tidak adil terhadap satu atau lebih ahli atau pemegang debentur termasuk dirinya sendiri. Oleh itu, sebelum seseorang pempetisyen boleh menuntut relief yang diperuntukkan di bawah s 181(2) Akta itu, beliau mesti terlebih dahulu membawa dirinya dalam lingkungan satu daripada dua cabang s 181(1) supaya dapat membuat aduan mengenai penindasan, diskriminasi tidak adil atau kemudaratannya lain.
- (2) Tidak terdapat apa-apa dalam petisyen itu yang menunjukkan bahawa pempetisyen telah dijejaskan selain dan lebih daripada pemegang saham responden yang lain supaya membolehkan beliau menuntut sebarang relief di bawah s 181(2)(a) Akta itu. Tindakan yang dikatakan itu tidak memudaratkan pempetisyen dalam kedudukannya sebagai seorang pemegang saham responden. Resolusi yang dicadangkan itu tidak akan hanya melibatkan pempetisyen terutamanya tetapi juga akan melibatkan semua pemegang saham secara kolektif, tanpa menindas pempetisyen seorang, atau mendiskriminasi terhadapnya secara tidak adil atau sebarang kemudaratannya yang lain, supaya menimbulkan mekanisme perlindungan di bawah s 181 Akta itu. Pliding tidak menunjukkan apa yang pempetisyen bertujuan membuat atau bagaimana resolusi itu termasuk dalam lingkungan s 181 Akta itu. Oleh itu, memandangkan bahawa petisyen itu tidak mendedahkan sebarang kausa tindakan yang munasabah terhadap responden, ia dibatalkan dan injunksi yang terlebih dahulu itu juga dibubarkan.

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Per curiam:

- (1) Dalam keadaan sebegini, bukanlah menjadi tugas mahkamah untuk mengawal urusan responden. Resolusi yang dicadangkan melibatkan kepentingan responden dan pemegang sahamnya secara keseluruhan dan terpulanglah kepada pemegang saham untuk

memutuskan sama ada pembahagian dividen itu seharusnya diluluskan atau tidak. Di mana kepentingan sebuah syarikat terlibat secara keseluruhannya, syarikat itulah yang harus bimbang. Kebimbangan itu ditunjukkan melalui kehendak pemegang saham pada mesyuarat agung dan kehendak majoriti terpaksa diutamakan. Jika pemegang saham memutuskan bahawa, pada hakikatnya, pengarah bertindak bertentangan dengan kepentingan syarikat itu, jadi terpulang kepada mereka untuk memberhentikan pengarah itu.

- (2) Mahkamah membuat pengiktirafan kehakiman bahawa syarikat yang disenaraikan di bursa saham juga membahagikan dividen dalam bentuk saham sebagai ganjaran kepada pemegang saham mereka dan bukan membahagikan dividen dalam bentuk wang tunai.]

Notes

For cases on oppression of members' rights, see 3 *Mallal's Digest* (4th Ed) paras 109-122.

Case referred to

- 1 *Foss v Harbottle* (1843) 2 Hare 461 (folld)

Loh Choong Wai (Gan Teik Chee & Ho) for the respondent.

Tan Phock Kin (Thillaimuthu & Phock Kin) for the petitioner.

Selventhiranathan JC: This is an application by the respondent company, Tong Eng Sdn Bhd (vide encl (13)) for the following orders:

- (a) that the originating petition herein be struck out on the grounds that:
 - (i) it discloses no reasonable cause of action; and/or
 - (ii) it is an abuse of the process of the court under O 18 r 19 of the Rules of the High Court 1980, and/or under the inherent jurisdiction of the court;
- (b) that the injunction dated 22 April 1991 granted by Edgar Joseph Jr J (as he then was) be dissolved;
- (c) that an inquiry as to damages be ordered in the event that the injunction is dissolved; and
- (d) that the costs of the application be paid by the petitioner to the respondent company.

The application was supported by the affidavit of Loh Loon Teik, a director of the respondent company.

On the first ground of the application that the petition discloses no reasonable cause of action, the respondent company cannot rely on any affidavit evidence. In the circumstances, it is incumbent upon the court to look at the petition and consider whether it does indeed disclose no reasonable cause of action.

- A The petition shows that the petitioner is a minority shareholder and one of the four directors of the respondent company. The petitioner alleged that on 3 April 1991, he received notice of an extraordinary general meeting of the shareholders of the respondent company which was to be held on 22 April 1991 for the purpose of considering and, if thought fit, to pass two ordinary resolutions. The first resolution was to propose that the respondent company declare a dividend in specie, to be satisfied by the distribution of its entire shareholding of 408,000 shares in the capital of Trio Paper Mills Sdn Bhd to its shareholders in proportion to their shareholding in its capital. The second resolution was for the directors of the respondent company to be authorized to dispose of all that piece of land and hereditaments known as
- B Lot 77, Mukim 17, North-East District, Penang ('the property') on or before 31 March 1992, at whatever price and upon whatever terms and conditions deemed reasonable.
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- The extraordinary general meeting, according to the petitioner, was allegedly called by order of the board of directors of the respondent company. The petitioner complained that he was a director and member of the board and it was not true that the resolutions were put forth by order of the board as they were not on the agenda of its meeting in question. He also complained that the valuation of the shares in Trio Paper Mills Sdn Bhd was not done properly and so it was not in the interest of the respondent company to have those shares distributed. He complained further that there was no valid
- D reason why the respondent company should sell its property in Batu Ferringhi as it was not in need of funds as revealed by its balance sheet. In addition, there was no valuation of the property and the proposed resolutions were vague and gave the directors freedom to manipulate. However, the petitioner did not reveal that he was in fact given the responsibility of finding a buyer for the property.
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- F The petitioner complained further that he had been denied access to the accounts of the respondent company and to the minutes of the meetings of the board of directors and it was only after he had filed Originating Summons No 24-661-90 and obtained an order of court that he was able to have such access. The petition itself does not reveal whether he did in fact obtain the accounts and minutes but he must have done so in order for him to have exhibited the accounts to the affidavit in support of the petition.
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- H The petitioner also alleged that the proposed resolutions were aimed at stripping the respondent company of its assets by disposing of its valuable assets at nominal values and to forestall the petitioner from taking legitimate action against the respondents (sic), including the appointment of a receiver and manager (of the respondent company). The action of the respondents (sic) in calling the extraordinary general meeting was not in the interests of the respondent company and its assets were being put in jeopardy. The petitioner, therefore, asked for the following orders in para 19 (which should in fact be para 20) of the petition:

- I (a) an order declaring that the proposed resolutions were not made bona fide in the interests of the respondent company and were therefore bad in law and invalid;

- (b) an order prohibiting the respondent company from passing or otherwise giving effect to the first ordinary resolution (to declare a dividend in specie of its entire shareholding in Trio Paper Mills Sdn Bhd); A
- (c) for appropriate remedies under s 181 of the Companies Act 1965 ('the Act'); and
- (d) for the appointment of a receiver and manager. B

It is observed that para 19 of the petition is nothing but a repetition of paras (a) and (b) of sub-s (1) of s 181 of the Act, and para 19 does not really show how the facts are related to the law. If one were to look at the other paragraphs of the petition, the essential complaint of the petitioner is that the respondent company is seeking to distribute a dividend in specie which he claims is not in the interest of the respondent company, and also to dispose of its property. As far as s 181 of the Act is concerned, for a petition to be filed under that section, it is incumbent upon the petitioner to show: C

- (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or D
- (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself). E

It is therefore abundantly clear that before any petitioner can seek the relief specified under sub-s (2) of s 181 of the Act, he has to first bring himself within one of the two limbs of sub-s (1) so as to be able to complain of oppression, or unfair discrimination or being otherwise prejudiced. F

To my mind, the two proposed resolutions would not affect the petitioner in particular as a member, shareholder or holder of debentures of the respondent company. The proposed resolutions would affect all the shareholders collectively without the petitioner being singled out for oppression, or unfair discrimination or other prejudicial treatment so as to trigger off the protection mechanism in s 181(1) of the Act. It is not the duty of the court in these circumstances to assume the role of policeman over the affairs of the respondent company. The two proposed resolutions involve the interests of the respondent company and its shareholders as a whole. It is for the shareholders, at the meeting to be convened, to decide whether the distribution of the dividend in specie should be approved or not. This is a practice which is not unknown of and the court takes judicial notice of the fact that even public listed companies resort to this form of dividend distribution to reward their shareholders instead of distributing dividends in cash. Insofar as the proposed disposal of the property of the respondent company is concerned, this is again a matter for the shareholders to decide whether they wish to authorize the directors to have full power to sell the property. If the majority of the shareholders so decide, then the will of the majority will have to prevail. The acts complained of here do not G
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- A affect the petitioner alone in his capacity as a member of the respondent company.

The situation in this case is one which comes within the rule in *Foss v Harbottle*¹ and the whole catenation of cases which derive their authority from that case and reinforce the principle that where the interests of a company are involved as a whole, it is the company itself which should be concerned and that concern is expressed through the will of the shareholders at the general meeting. Should the shareholders determine that the directors are in fact acting against the interests of the company, then it is for them to remove the directors. The rule in *Foss v Harbottle*¹ is stated thus by LS Sealy in *Cases and Materials in Company Law* (4th Ed) at p 445:

- C The court will not ordinarily intervene in a matter which it is competent for the company to settle itself or, in the case of an irregularity, to ratify or condone by its own internal procedure. Where it is alleged that a wrong has been done to a company, prima facie the only proper plaintiff is the company itself.

- D This is repeated by Walter Woon in *Company Law* (1988) at p 126:

Section 216 (of the Companies Act of Singapore which is in pari materia with s 181 of the Act) embodies a member's personal right to be treated fairly. As such, the rule in *Foss v Harbottle* does not restrict a member's ability to petition for relief. Section 216 belongs in the class of members' personal rights and therefore properly falls outside the scope of the proper plaintiff rule. However, it must be clear that the member is indeed seeking relief in respect of an injury done to himself. *Where what is complained of is in fact an injury to the company and not to the petitioning member, the proper plaintiff is the company itself. It should be borne in mind that an injury to the company is not ipso facto an injury to the members: Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] 1 All ER 354. (Emphasis added.)*

- F At p 121 of the same textbook, Walter Woon has this to say:

Mismanagement of the company does not necessarily constitute oppression or disregard of a member's interests: *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242. Nor, indeed, does the fact that a member is consistently outvoted mean that he is oppressed or that his interests are being disregarded. It should be remembered that the majority also has rights. Section 216 does not give jurisdiction to the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law: *Re Bright Pine Mills Pty Ltd* [1969] VR 1002.

- G The acts complained of must affect the member in his capacity as a member. This is apparent from the wording of the section itself: *Re HR Harmer Ltd* [1958] 3 All ER 689. If the acts in question affect the complainant in some capacity other than as member, he has no right to complain under s 216. For example, a director may feel that the other directors are unfairly excluding him from the management of the company. Even if he is a member of the company, this does not come within the ambit of s 216 since then he is oppressed in his capacity as director, not as member. However, if a person is oppressed in his capacity as member he may get relief in respect of acts that affect him in some other capacity as well.
- I

There is nothing in the pleadings as reflected in the petition which shows that the petitioner is affected apart from and over and above the other

shareholders of the respondent company so as to enable him to seek any relief under s 181(2)(a) of the Act, ie to apply to the court to direct or prohibit any act or cancel or vary any transaction or resolution of the respondent company. The pleadings do not show what the petitioner is seeking to do or how exactly the two proposed resolutions which are complained of fall within the ambit of s 181 of the Act. I find that on the pleadings itself, the respondent company has satisfied me that the petition discloses no reasonable cause of action against the respondent company from the time the petition was filed up to the present and I therefore make an order in terms of the application in encl 13 that the petition herein be struck out. By reason of this order it naturally follows that the injunction dated 22 April 1991 is also dissolved. I further order that an enquiry be held by the senior assistant registrar to assess the damages which the respondent company may have sustained as a result of the injunction. Finally, I order that the costs of these proceedings be paid to the respondent company by the petitioner.

In view of my decision on this application in encl 13, there is no need for me to proceed further to consider the application in encl 19 for the appointment of a provisional receiver and manager as the effect of my decision is to bring these proceedings to an end.

En passant, I thank both Encik Loh Choong Wai and Encik Tan Phock Kin for their assistance to the court but would, for the future, urge counsel in cases where they appear, to prune their written submissions and copious authorities to the necessary minimum so as to reduce the impingement on everybody's time. It would be of further considerable help to the court to reduce the plethora of unnecessary affidavits and applications, the filing of which also leads to an escalation of the parties' costs.

Application allowed.

Reported by Anne Khoo

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